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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LUNDAY-THAGARD COMPANY,
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the court of appeals disregarded this Court's decisions in *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862 (1984); *Hatzlachh Supply Co. v. United States*, 444 U.S. 460 (1980); and *The Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974); in ruling that the Economic Stabilization Act of 1970 impliedly repealed petitioner's Tucker Act remedies against the Department of the Interior for breach of contract, monies unlawfully exacted and retained, and violations of federal statutes and regulations, in the absence of any expression of Congressional intent to withdraw such Tucker Act remedies.

2. Whether the court of appeals disregarded this Court's decision in *United States v. Mitchell*, 463 U.S. 206 (1983), by ruling that petitioner's action under the Tucker Act for breach of contract, money unlawfully exacted and retained, and violation of federal statutes and regulations is barred because the federal statute creating the substantive right (independent of the contract and exaction claims) does not itself contain an explicit waiver of sovereign immunity.

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UNITED STATES DEPARTMENT OF THE INTERIOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Lunday-Thagard Company * ("Lunday-Thagard") hereby petitions for a writ of certiorari to the Temporary Emergency Court of Appeals of the United States ("TECA") in this case.

OPINIONS BELOW

Neither the opinion of the Temporary Emergency Court of Appeals (App. A) nor the opinions of the United States District Court of the Western District of Louisiana (App. B and App. C) have yet been reported.

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* World Oil Company is the parent of petitioner Lunday-Thagard Company. World Oil Company is also the parent of Pan Pacific Petroleum Company, Sunland Refining Corporation, and World Oil Marketing Company.

JURISDICTION

The judgment of the Court of Appeals was entered on July 26, 1985. By order dated August 7, 1985, the Chief Justice extended the time within which this petition may be filed to and including September 25, 1985. This Court's jurisdiction is invoked under Section 211(g) of the Economic Stabilization Act of 1970 ("ESA") as amended, 12 U.S.C. § 1904 note, as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627, 633.

STATUTES AND REGULATIONS INVOLVED

The Tucker Act, 28 U.S.C. § 1346, provides, in pertinent part:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court of:
>
> . . .
>
> (b) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . . .

Section 210 of the Economic Stabilization Act provides, in pertinent part:

> Suits for Damages or Other Relief.
>
> (a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

Section 211 of the Economic Stabilization Act provides, in pertinent part:

> (a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy . . . .

10 C.F.R. § 212.52 (1980) provided, in pertinent part:

> The prices charged for any sale, lease or lease-sale of a covered product by any Federal Department, agency, or other instrumentality, including any wholly-owned Government corporation as defined in the Government Corporation Control Act of 1945, as amended, and by state and local governments are subject to the price regulations of this part . . . .

STATEMENT OF THE CASE

The questions presented here concern the extent of the federal government's immunity from a civil damage action arising out of its activities as a seller of crude oil. For over a decade, the Department of Energy ("DOE") and its predecessor agencies, through prosecution of numerous administrative and judicial enforcement proceedings, have strictly enforced the regulations governing prices that private parties were permitted to charge in sales of crude oil and refined petroleum products. For example, a $2 billion judgment secured by the government against Exxon Corporation for alleged violations of DOE regulations governing sales of crude oil was recently affirmed by the Temporary Emergency Court of Appeals. *See United States v. Exxon Corporation*, Nos. DC-91 through DC-100 (TECA, July 1, 1985). In addition, Section 210 of the Economic Stabilization Act ("ESA") authorizes "[a]ny person suffering legal wrong" as a result of a violation of DOE's price control regulations to bring a civil damage action for recovery of overcharges in a district court of the United States.

This action was brought by Lunday-Thagard against the United States Department of the Interior for recovery of overcharges resulting from Interior's sale of crude oil to Lunday-Thagard at prices in excess of those permitted by DOE's regulations. It is undisputed that DOE's price control regulations were as applicable to federal agencies as they were to private parties. Moreover, Interior's crude oil sales contracts with petitioner expressly provided that Interior would comply with DOE price control regulations. Nevertheless, while recognizing that Lunday-Thagard "presents a claim of injury which on its face appears to call for a remedy," the court below concluded that Interior is immune from a civil damage action, brought under Section 210 of the ESA and under the Tucker Act, to recover approximately $6 million in overcharges being retained by the United States.

Background

Lunday-Thagard, a small independent refiner, purchased crude oil from Interior during the period April 1973 through January 1981.[1] These purchases were made under several contracts, each providing that the price Lunday-Thagard was to pay Interior would not exceed the maximum allowable price permitted under the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. § 751 *et seq.* The EPAA required the President (or his designee) to promulgate regulations governing the maximum price that could be paid for crude oil and refined petroleum products. In addition, the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 et seq., and 10 C.F.R. § 212.52 expressly provided that crude oil

[1] Under the Mineral Lands Leasing Act of 1920, 30 U.S.C. § 181 et. seq., and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et. seq., the Secretary of the Interior is authorized to grant oil and gas leases on federally owned or controlled lands. The Secretary may take royalties accruing under the leases "in kind" and may sell the oil to small independent refiners, such as Lunday-Thagard.

sales by Interior were subject to the DOE price control regulations.

Section 210 of the ESA provides a right of action for recovery of any overcharges incurred in purchases of crude oil and refined products "without regard to the amount in controversy." Section 211 of the ESA provides exclusive jurisdiction in the district courts over "cases or controversies arising under this title . . . notwithstanding the amount in controversy. . . ." In addition, Section 23(a)(1) of OCSLA, 43 U.S.C. § 1349(a)(1), authorizes civil actions against "any person, including the United States, and any other government instrumentality or agency . . . for any alleged violations of any provision of this subchapter . . ."

Proceedings in the district court

Lunday-Thagard brought this action, pursuant to the Tucker Act, Section 210 of the ESA, and OCSLA, alleging that Interior violated both the DOE regulations and the contracts incorporating those regulations, and seeking the return of approximately $6 million dollars in overcharges being retained by Interior. The action was brought in district court, and not the Claims Court, because the ESA confers exclusive jurisdiction on district courts to consider controversies concerning the DOE regulations "without regard to the amount in controversy," thereby apparently waiving the Tucker Act's $10,000 limitation on actions brought in district court. Such a waiver is consistent with ensuring that all appeals in cases arising under the EPAA are decided by TECA, as provided in Section 211 of the ESA.

The government moved to dismiss Lunday-Thagard's complaint on the ground that the action was barred both by a one-year Louisiana statute of limitations and by sovereign immunity. The district court dismissed the complaint as time barred, holding that the one-year Louisiana Statute of limitations applied to this action, not 28 U.S.C.

§ 2401(a), which provides a six year limitation period for "every civil action commenced against the United States . . . ." (App. B, C). In dismissing the complaint, the district court did not address the sovereign immunity issue.

Proceedings in the Court of Appeals

On appeal, the government did not seriously press the statute of limitations issue, and the Temporary Emergency Court of Appeals ("TECA") did not address it. Rather, the government urged affirmance on the ground that the action was barred by the doctrine of sovereign immunity. In response, Lunday-Thagard asserted that sovereign immunity did not bar claims for recovery of money paid to (and unlawfully retained by) the government, for breach of contract, and for violation of federal statutes and federal regulations because such claims are squarely within the waiver of sovereign immunity provided by the Tucker Act, 28 U.S.C. §§ 1346, 1491. TECA nevertheless ruled that the action was barred by sovereign immunity.

In its decision, TECA acknowledged that "[e]ach contract provided that the price to be paid would be the highest allowable by the EPAA" (App. A at 2a), and acknowledged that "plaintiff claimed that . . . these alleged violations . . . constituted a breach of contract" (App. A at 3a). Because actions for breach of contract are unquestionably within the scope of the Tucker Act, this should have ended the inquiry regarding sovereign immunity. TECA held, however, that because the ESA provides exclusive district court jurisdiction for claims arising under the EPAA regulations, the ESA has repealed all Tucker Act remedies notwithstanding the absence of any expression of Congressional intent to repeal such remedies, either in the text of the ESA or in its legislative history:

> The claim here does not fall within the Tucker Act because Section 211 [of the ESA] places jurisdiction of EPAA claims in the district courts. On the other hand, the Tucker Act places jurisdiction of a claim for over $10,000 in the Court of Claims.

(App. A at 7a). In so ruling, and thus implicitly finding the ESA to be incompatible with the Tucker Act, TECA failed to address the ESA's grant of district court jurisdiction "without regard to the amount in controversy," statutory language long held to waive the Tucker Act's $10,000 limitation on actions brought in district court.

With respect to Lunday-Thagard's Tucker Act claim for damages resulting from the government's violations of the EPAA and regulations promulgated thereunder, TECA disregarded this Court's ruling in *United States v. Mitchell*, 463 U.S. 206 (1983), stating:

> Clearly, *Mitchell* does not apply because the whole purpose of the Tucker Act . . . is to permit suit against the United States, and it spells out that permission in specific terms.

(App. A at 7a). TECA thereupon sought to determine whether any statute in addition to the Tucker Act expressly waived sovereign immunity. TECA determined that none did, stating that "[n]owhere in Section 210 which governs remedies . . . do we find any express waiver [of sovereign immunity]" (App. A at 4a).

Paradoxically, however, after going out of its way to preclude every remedy available, including transfer to the Claims Court in lieu of dismissal, and in the process going into conflict with four recent decisions of this Court, TECA noted:

> Plaintiff presents a claim of injury which on its face appears to call for a remedy. However, we are dealing with a statute which does not afford a remedy, and the plaintiff must look to the Congress for relief.

(App. A at 8a).

REASONS FOR GRANTING THE WRIT

This is a case in which the United States Department of the Interior sold oil to a small, independent oil refiner at prices in excess of the price ceiling established by the parties' express contract and by federal law. When the independent refiner brought suit to recover these overcharges, the Temporary Emergency Court of Appeals held that the suit was barred by the doctrine of sovereign immunity, notwithstanding the fact that the Tucker Act waives sovereign immunity for all contract claims against the government. TECA also held that while the Department of the Interior was required to comply with the price limits imposed by the EPAA, if it exceeded those price limits it could keep the resulting overcharges, because the ESA does not contain a waiver of sovereign immunity in addition to that contained in the Tucker Act.

The Department of Interior has asserted, and Lunday-Thagard does not deny, that the totality of parallel overcharge claims by other small refiners exceed $1,000,000,000.[2] The effect of the lower court's decision is to wipe out all these claims and to permit the Department of the Interior to retain the billion dollars it obtained from private parties in direct violation of its contractual obligations and in direct violation of federal law.

TECA's decision is grounded on two demonstrably wrong—and dangerous—propositions:

(1) When Congress gave the federal district courts jurisdiction over all EPAA claims, by implication Congress was repealing the Tucker Act's waiver of sovereign immunity for breach of contract claims involving any interpretation of EPAA; and

(2) The Tucker Act waiver of sovereign immunity for claims brought under federal law does not apply to

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[2] *See Department of the Interior*, Energy Mgmt. (CCH) 12 DOE ¶ 81,012 at 82,567 (1984).

EPAA claims because neither the EPAA nor the ESA contains a separate waiver of sovereign immunity.

In so ruling, TECA has gone into direct conflict with numerous decisions of this Court, the Federal Circuit, the Claims Court, as well as all six district court rulings on motions to dismiss similar actions brought by other small refiners against Interior in connection with price control violations.

The doctrine of sovereign immunity was never intended to permit agencies of the United States to reap a windfall in commercial transactions by violating statutory, regulatory and contractual obligations with impunity. Rather, the doctrine was intended to prevent litigation from interfering with essential governmental activities. *United States v. Lee*, 106 U.S. 196 (1882); *Nichols v. United States*, 74 U.S. (7 Wall.) 122 (1868). For this reason, the doctrine has never barred an action to recover one's own money that has been wrongfully exacted or retained. *See Bank of the United States v. Bank of Washington*, 31 U.S. (6 Pet.) 8 (1832). In this action, Lunday-Thagard is not seeking an award of the taxpayer's money from the Treasury. Rather, Lunday-Thagard is simply seeking the return of its own money that has been wrongfully exacted by means of a breach of contract and violations of federal law.

The Department of the Interior engages in numerous commercial transactions with private parties through its leases of federal lands to permit recovery of oil, oil shale, gas, uranium, timber, coal, phosphate, sodium, and potassium, and through its sale of these products. *See* 30 U.S.C. §§ 181, 351, 601. The decision in this case threatens to immunize Interior from any liability arising out of these commercial transactions.[3]

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[3] Indeed, Interior has already urged a district court to dismiss an action for refund of royalty overpayments, brought against

I. The decision below conflicts with recent decisions of this Court holding that later enacted legislation cannot implicitly repeal Tucker Act Remedies

The terms of the relevant contracts required Interior to adhere to the Department of Energy's price control regulations in the prices it charged Lunday-Thagard for crude oil. Accordingly, independent of any claims for violation of those regulations, Lunday-Thagard has claims for breach of contract and for the return of money unlawfully retained by the United States. These types of claims are ones that unquestionably fall squarely within the scope of the Tucker Act. Even before this Court's decision in *United States v. Mitchell*, 463 U.S. 206 (1983) (*"Mitchell II"*), there was no dispute that the Tucker Act waived sovereign immunity for breach of contract and unlawful exaction claims. *United States v. Testan*, 424 U.S. 392, 401-02 (1976); *Eastport Steamship Corporation v. United States*, 372 F.2d 1002, 1007-8 (Ct. Cl. 1967). Indeed, in the Brief for the United States filed on behalf of the Department of the Interior in *Mitchell II* (No. 81-1748), the government expressly conceded that a Tucker Act waiver of sovereign immunity "is effective whenever an independent basis for recovery of damages exists, be it a contract [or] the government's retention of funds owned by the claimant . . . ." Brief at 19. *See also, id.* at 8, 24, 30. This was emphatically reaffirmed by this Court's decision in *Mitchell II*:

> The existence of a waiver is readily apparent in claims founded upon "any express or implied contract with the United States." . . . The Court of Claims' jurisdiction over contract claims against the government has long been recognized, and government liability in contract is viewed as perhaps "the

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Interior by a lessee of a federal gas lease, on the basis of TECA's decision in the instant case. *See* Memorandum in Support of Defendant's Motion to Dismiss in Mesa Petroleum Co. v. United States Department of the Interior, Civil No. 84-1967-LC (W.D.La.) filed September 9, 1985 (App. D at 28a-29a).

> widest and most unequivocal waiver of federal immunity from suit."

463 U.S. at 215. Accordingly, it is beyond dispute that sovereign immunity does not bar actions for breach of contract or actions in which " 'the Government has the citizen's money in its pocket' and the claim is 'to recover an illegal exaction made by officials of the Government,' " *Eastport Steamship Corporation, supra.*, 372 F.2d at 1008.

Notwithstanding Lunday-Thagard's claims for unlawful exaction and for breach of contract, as well as its claim for violation of federal statutes and regulations, TECA ruled that:

> [T]he claim here does not fall within the Tucker Act because Section 211 places jurisdiction of EPAA claims in the district courts. On the other hand, the Tucker Act places jurisdiction of a claim over $10,000 in the Court of Claims.

(App. A at 7a). In so ruling, TECA ignored an interpretation of the two statutes which would render them consistent. Section 211 of the ESA confers jurisdiction upon the district courts "notwithstanding the amount in controversy," thus waiving the $10,000 limit on Tucker Act claims brought in district courts pursuant to 28 U.S.C. § 1346, and in the process, preserving TECA's exclusive appellate jurisdiction in such cases.

In other cases involving statutes providing for jurisdiction in the district courts "without regard to the amount in controversy," the lower courts have consistently held that such language waives the Tucker Act's $10,000 jurisdictional limitation for maintaining actions in the district courts. *Munoz v. Small Business Administration*, 644 F.2d 1361 (9th Cir. 1981); *Mar v. Kleppe*, 520 F.2d 867 (10th Cir. 1975); *Robinson v. United States*, 551 F. Supp. 1120 (M.D.La. 1982); *Selected Risks Insurance Company v. Kobelinski*, 421 F. Supp. 431 (E.D. Pa. 1976).

Thus, although there is no inconsistency between the ESA and the Tucker Act, and in spite of the fact that neither the ESA nor its legislative history reflects any Congressional intent to repeal Tucker Act remedies, TECA has ruled that the later enacted ESA has implicitly repealed Lunday-Thagard's Tucker Act remedy. In so ruling, TECA has gone into conflict with three recent decisions of this Court.

In the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), this Court considered the question of whether the Regional Rail Reorganization Act of 1973 withdrew a Tucker Act remedy. That case, like this case, involved "emergency" legislation which provided for the "impaneling of [a] Special Court and the consolidation before it of 'all judicial proceedings with respect to the final system plan.'" 419 U.S. at 127. Moreover, there, as here, nothing on the face of the statute indicated that a Tucker Act remedy was intended to be withdrawn, and the Court was unable to find anything in the legislative history to support such a withdrawal. "The most that can be said is that the Rail Act is ambiguous on the question." 419 U.S. at 133. In such circumstances, this Court held that a later enacted statute will not be construed as wholly or even partially amending or repealing a prior one unless the two statutes cannot be reconciled. 419 U.S. at 134. As we have just demonstrated, the ESA can easily be reconciled with the Tucker Act. Moreover, this Court's decision in the *Regional Rail* cases also concluded that there would be grave doubts regarding the constitutionality of the Rail Act if it were read as withdrawing a Tucker Act remedy for injuries not compensated by the Rail Act itself. *Id.* Obviously, the same can be said of the ESA.

Similarly, in *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862 (1984), this Court refused to find that the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") implicitly repealed Tucker Act remedies. Reiterating the

principles articulated in the *Regional Rail Reorganizations Act Cases*, the Court found no discussion in FIFRA, or its legislative history, "of the interaction between FIFRA and the Tucker Act" 104 S. Ct. at 2881. Further, this Court found the two statutes to be "capable of coexistence." *Id.* Accordingly, both were regarded as effective.

Finally, in *Hatzlachh Supply Co. v. United States*, 444 U.S. 460 (1980), this Court ruled that the exemption from tort liability under the Federal Tort Claims Act for claims arising from the detention of merchandise by customs officers does not preclude an action under the Tucker Act for breach of an implied-in-fact contract of bailment. The Court reasoned that in enacting the exemption from tort liability, Congress expressed no intent to disturb existing Tucker Act remedies.

Thus, where, as here, the Tucker Act and another statute "are 'capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.' " *Regional Rail Reorganization Act Cases*, 419 U.S. at 133-34; *Ruckelshaus v. Monsanto*, 104 S. Ct. at 2881.

Finally, at the very least, even if it is determined that Lunday-Thagard's Tucker Act claims in excess of $10,000 may not be brought in district court, the action should be transferred to the Claims Court pursuant to 28 U.S.C. § 1631. Neither Lunday-Thagard's contract claim nor its claim for unlawful exaction arises directly under the EPAA. Accordingly, even if an action for violation of EPAA regulations may not be maintained under the Tucker Act, Lunday-Thagard's claim for breach of contract and for unlawful exaction are unquestionably Tucker Act claims. There is no conceivable bar to the transfer of Lunday-Thagard's Tucker Act claims to the Claims Court. Absent such a transfer, a holding that the ESA has withdrawn a Tucker Act remedy leaves Lunday-Thagard with no means whatsoever for recover-

ing the approximately $6 million of its money being unlawfully withheld by the United States. As TECA noted:

> Plaintiff presents a claim of injury which on its face appears to call for a remedy. However, we are dealing with a statute which does not afford a remedy, and the plaintiff must look to the Congress for relief.

(App. A at 8a). This conclusion places the constitutionality of the ESA in serious doubt, thus violating the "canon of construction that . . . when a statute is ambiguous, 'construction should go in the direction of constitutional policy.'" *Regional Rail Reorganization Act Cases*, 419 U.S. at 134. It is submitted, however, that Congress has already provided relief, and that relief has been provided in the Tucker Act.

II. The decision below conflicts with this Court's decision in *Mitchell II*, and with decisions of the Federal Circuit and the Claims Court construing *Mitchell II*, that a statute or regulation relied upon as the substantive source of a Tucker Act claim need not itself provide an explicit waiver of sovereign immunity

TECA's decision threatens to reopen a controversy this Court put to rest in *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*"). In *Mitchell II*, also an action brought against the Interior Department, this Court held that the Tucker Act itself provides the necessary waiver of sovereign immunity for claims based upon alleged violations of federal statutes and regulations and that "the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity." 463 U.S. at 218-219. Thus, in actions based upon alleged violations of federal statutes and regulations that would be cognizable under the Tucker Act, the proper inquiry is "whether the source of substantive law can fairly be interpreted as mandating

compensation by the Federal Government for the damages sustained." 463 U.S. at 218.

TECA, however, disregarded this decision stating:

> Clearly, *Mitchell* does not apply because the whole purpose of the Tucker Act . . . is to permit suit against the United States, and it spells out that permission in specific terms. The EPAA merely speaks of "persons" who may sue or be sued.

(App. A at 7a). At the outset, neither the EPAA nor the ESA speaks of " 'persons' who may sue or be sued." In any event, TECA concluded that Lunday-Thagard's action was barred by sovereign immunity because "[n]owhere in Section 210 which governs remedies . . . do we find any express waiver." (App. A at 4a).

Even construing TECA's decision as one attempting to determine whether the ESA "can fairly be interpreted as mandating compensation," TECA's ruling is in conflict with *Mitchell II*, and with lower court rulings construing *Mitchell II*. TECA limited its inquiry to whether the ESA *expressly* mandates compensation by the United States, a standard rejected by this Court in *Mitchell II* as too stringent:

> Because the Tucker Act supplies a waiver of sovereign immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity, *nor need they be construed in the manner appropriate to waivers of sovereign immunity.*

463 U.S. at 218-219 (emphasis added). *See also Short v. United States*, 719 F.2d 1133, 1135 (Fed. Cir. 1983), *cert. denied*, 104 S. Ct. 3545 (1984). The Claims Court has read *Mitchell II* as holding that "the substantive right to recover money damages need not be express, but may be implied." *Anderson v. United States*, 5 Cl. Ct. 573, 577 (1984), *aff'd*, 764 F.2d 849 (Fed. Cir. 1985). In *Anderson*, the claims court went on to state:

> Although *Mitchell II* does not provide specific guidelines for implying a right to monetary damages in any particular case, the Court's reasoning in that decision, including its re-interpretation of *Testan* and *Mitchell I* can reasonably be analyzed as follows:
>
> The Constitution, a statute, or a regulation should be "fairly interpreted as mandating compensation" when
>
> (1) A right to a benefit is thereby conferred;
>
> (2) The benefit conferred is economic in nature;
>
> (3) The Government breaches its duty to confer that benefit.

5 Cl. Ct. at 577. We submit that this is the correct interpretation of *Mitchell II*. Indeed, *Mitchell II* itself sought to clarify the law regarding waivers of sovereign immunity under the Tucker Act in light of "isolated language" in *Testan* and *Mitchell I*. *See* 463 U.S. at 216. TECA's decision in this case threatens to reopen the very issue that this Court sought to settle in *Mitchell II*.

Finally, under the standards announced in *Mitchell II*, and the cases following it, the ESA and the EPAA, fairly read, *do* mandate compensation. Section 210 of the ESA provides a right of action for money damages by "[a]ny person suffering legal wrong because of any act or practice arising out of this title . . . ." The United States and its agencies were expressly made subject to the Department of Energy's Mandatory Petroleum Price Regulations, which were issued under authority of the EPAA, and which incorporated Section 210 of the ESA by reference. 15 U.S.C. § 754, 12 U.S.C. § 1904 note. *See Mohawk Petroleum Corp. v. Department of the Navy*, 521 F.2d 1394 (TECA 1975); 10 C.F.R. § 212.52. Interior was explicitly made subject to the EPAA regulations, and was made subject to civil actions for violations of those regulations, by 1978 amendments to OCSLA. 43

U.S.C. §§ 1349(a)(1), 1353(b)(1), (e)(1). Thus, Section 210, which provides a damage remedy for violations of price control regulations which are expressly applicable to agencies of the United States, unquestionably provides a damage remedy against Interior in this case.[4]

Significantly, every district court that has considered the question of Interior's immunity from damage actions arising out of its sale of crude oil has concluded that Interior is not immune. *See Howell Corporation v. United States Department of the Interior*, No. 84-5153 (E.D. La. 1985); *Wesreco, Inc. v. Department of the Interior*, No. 84-0126 (D. Utah 1985); *Tipperary Refining Co. v. Department of the Interior*, No. MO-84-CA-05 (W.D. Tex. 1985); *Glenrock Refinery, Inc. v. Department of the Interior*, No. C84-264B (D. Wyo. 1984); *Young Refining Corp. v. Department of the Interior*, No. 82-2048 (E.D. La. 1983); *Wyoming Refining Co. v. Department of the Interior*, 547 F. Supp. 297 (D. Wyo. 1982).[5]

The only court to find that the United States is immune from liability for crude oil overcharges is TECA. Unfortunately, however, TECA is the court of last resort in all of these cases. As a result, if TECA's decision is permitted to stand, all pending cases likely will be dismissed.

In sum, the ESA is both perfectly consistent with the Tucker Act and, fairly read, mandates compensation by the United States in the circumstances of this action. There is no reason why Lunday-Thagard should be de-

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[4] Indeed, in 1982, the Department of the Interior proposed legislation which would have retroactively relieved it from liability for its violations of the DOE's Mandatory Petroleum Price Regulations. S. Rep. 512, 97th Cong., 2d Sess. 41 (1982). This amnesty provision was proposed after the expiration of price controls, when the only kind of action available was one for damages, injunctive relief having been rendered meaningless by decontrol. Congress refused to enact the Interior amnesty provision. *Id.* at 20.

[5] Copies of unreported decisions have been lodged with the Court.

prived of its day in court and its opportunity to attempt to recover the money unlawfully retained by the United States as a result of its breach of contract and violation of applicable statutes and regulations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID A. DONOHOE, P.C.
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Dated: September 24, 1985

APPENDICES

APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 5-115

LUNDAY-THAGARD COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
Defendant-Appellee.

(Argued June 11, 1985 Decided July 16, 1985)

Judgment Entered: July 26, 1985

DAVID A. DONOHOE, Akin, Gump, Strauss, Hauer & Feld, Washington, D.C., with whom Jerry E. Rothrock and Harry R. Silver, of the same firm, were on the brief for Plaintiff-Appellant.

THOMAS MILLET, Attorney, United States Department of Justice, Civil Division, Washington, D.C., with whom Richard K. Willard, Acting Assistant Attorney General, and Stephen E. Hart, Attorney, Department of Justice, Civil Division, Washington, D.C., were on the brief for Defendant-Appellee.

William W. DePaulo and Richard H. Streeter, Wheeler & Wheeler, Washington, D.C., were on the brief for Amicus Curiae Howell Corporation.

John R. Cope, Darci L. Rock and Mary Caroline Parker, Bracewell & Patterson, Washington, D.C., were on the brief for Amicus Curiae Laketon Asphalt Refining, Inc.

Before METZNER, PECK and POINTER, Judges.

METZNER, Judge.

Plaintiff Lunday-Thagard Company ("Lunday-Thagard") appeals from a judgment of the Western District

of Louisiana (Vernon, J.) dismissing as time-barred its action for overcharges. Section 210 of the Emergency Stabilization Act ("ESA"), 12 U.S.C. § 1904 Note, as incorporated in § 5(a)(1) of the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. § 754. The claim arises from the sale of crude oil by defendant United States Department of Interior ("DOI"). The action also asserts a claim for breach of contract. DOI seeks affirmance of the judgment and renews its argument, pressed below, that the district court lacked jurisdiction of the action because Congress has not waived sovereign immunity.

Plaintiff, a small independent refiner, purchased federal royalty crude oil [1] from the United States Geological Survey, a sub-agency of the DOI, between June 1976 and January 1981 pursuant to several contracts. Each contract provided that the price to be paid would be the highest allowable by EPAA. During that period applicable EPAA regulations established the well-known two-tier price structure for the sale of domestic crude oil. 10 C.F.R. Part 212, Subpart D. *See* 39 Fed. Reg. 1924 (Jan. 15, 1974); 41 Fed. Reg. 4931 (Feb. 3, 1976). Under this structure the regulations required each seller to certify to its purchasers, in writing within two months of a sale, the amount and kind of oil it had sold in each price category. 10 C.F.R. § 212.131(a)(6). If certification was not timely or was not in proper form, the subject oil was deemed to be "old crude" and could be sold lawfully only at the lower-tier price. 10 C.F.R. §§ 212.72 and 212.73.

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[1] Under the Mineral Lands Leasing Act of 1920, 30 U.S.C. § 181 et seq., and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq., the Secretary of the Interior is authorized to grant oil and gas leases on federally owned or controlled lands. The Secretary may take royalties accruing under the leases "in kind" and may sell the oil to defined classes of small independent refiners.

Plaintiff's complaint, which was filed in December 1983, alleges that DOI failed to properly certify the royalty crude oil it sold but nonetheless charged plaintiff the upper-tier price. Plaintiff's theory is that failure to properly certify, without regard to the propriety of the price charged, entitles it to claim that it was overcharged and entitled to a refund of approximately $6 million, and an additional $12 million for willful overcharging, under Section 210(b). *See* 10 C.F.R. §§ 212.72 and 212.73.

Plaintiff also alleges that DOI imposed administrative fees and surcharges on the contract price of the crude oil and failed to reimburse it for transportation payments made to third parties, all in violation of EPAA regulations. 10 C.F.R. § 212.74. Finally, plaintiff claims that each of these alleged violations also constituted a breach of contract.

Initially, the sovereign immunity issue must be addressed to determine whether subject matter jurisdiction exists in this case. *Department of Energy v. Hunt*, 734 F.2d 816, 826 (Temp. Emer. Ct. App. 1984). As the Supreme Court has time and again noted, "[i]t is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212, 103 S. Ct. 2961, 2965 (1983).

The traditional doctrine of sovereign immunity holds that in the absence of express and unambiguous congressional consent, the United States is not subject to suit. *See United States v. King*, 395 U.S. 1, 4 (1969).

This claim for damages rests on alleged violations of the EPAA and the regulations implementing it, except for the relatively small claim seeking reimbursement for transportation payments. *Johnson Oil Co. v. Department of Energy*, 690 F.2d 191, 196 (Temp. Emer. Ct. App. 1982). Resolution of the EPAA claims is therefore governed by Sections 210 and 211 of the ESA. It is these

sections to which we must turn in order to determine whether Congress has waived sovereign immunity as to suits seeking changes under the EPAA. Nowhere in Section 210 which governs remedies (*see Griffin v. United States*, 537 F.2d 1130 (Temp. Emer. Ct. App.), *cert. denied*, 429 U.S. 919 (1976)), do we find any express waiver.

An argument has been made that an implied waiver can be found in Section 210(b) of the ESA, which provides that an action may be brought against any "person" who violates the overcharge provisions to recover up to treble damages. The validity of this argument depends on whether the government is considered a person. On several occasions it has been held that the government does not come within the definition of a "person." *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941). *See also United States v. Mine Workers*, 330 U.S. 258, 275 (1974).

It should also be noted that if it were intended by Congress to include the government within this provision, it would be unusual, and probably the first time, that treble damages were ever allowed against the United States. This makes it all the more obvious that Congress did not intend by implication to waive sovereign immunity in overcharge actions under Section 210.

It has also been argued that an implication of waiver may be found in a portion of legislative history which reads:

> "Section 210 provides a traditional method by which violators of regulations may be discovered and other would-be violators may be deterred. This can be accomplished by authorizing a person suffering a legal wrong to bring a treble damage action against the violator.
>
> This action is intended to be brought by private persons against other private persons. The Govern-

> ment will not bring such action nor be the subject of one." S. Rep. No. 92-507, 92d Cong., 1st Sess., reprinted in 1971 U.S. Code Cong. & Admin. News, pp. 2283, 2291.

Even assuming that the second paragraph refers only to treble damage actions, this statement is a slender reed indeed on which to imply that it was Congress' intent to permit the government to be sued for single damages.

We find that *McCulloch Gas Processing Corporation v. Canadian Hidrogas Resources, Ltd.*, 577 F.2d 712 (Temp. Emer. Ct. App.), *cert. denied*, 439 U.S. 831 (1978), controls this case. There, too, a plaintiff sought money damages against the United States. The court squarely held that Section 210 does not provide the plaintiff with a cause of action for damages against the United States, except in fifth amendment taking cases. *See Griffin v. United States, supra.* Judge Christensen in his concurrence in *McCulloch* specifically pointed out that neither Sections 210 nor 211 waived sovereign immunity, and further stated that "the limitation of the jurisdiction of the courts by § 211 to interlocutory relief in suits against the United States merely reemphasized the absence of any waiver of governmental immunity with reference to damages not constitutionally mandated." 577 F.2d at 718.

The decision in *McCulloch* appears to be at odds with the holding in *Mohawk Petroleum Corp. v. Department of the Navy*, 521 F.2d 1394 (Temp. Emer. Ct. App. 1975), that federal agencies are subject to EPAA pricing regulations, and that the court was therefore empowered to issue an injunction requiring such compliance. However, it is clear, and the government has admitted on oral argument, that the issue of sovereign immunity was never raised in *Mohawk.*

After the decision in *McCulloch*, several district courts distinguished the holding in that case on the basis that

it was concerned solely with the government acting in a regulatory capacity. These district courts were concerned with damage suits against the government acting in a "commercial" capacity. *See Wesreco, Inc. v. Department of the Interior*, No. 84-0126, slip. op. (D. Utah April 12, 1985); *Tipperary Refining Co. v. Department of the Interior*, No. MO-84-CA-05 (W.D. Tex. Jan. 16, 1985); *Glenrock Refinery, Inc. v. Department of the Interior*, No. C84-264B (D. Wyo. Dec. 5, 1984); *Wyoming Refining Co. v. Department of the Interior*, 547 F. Supp. 297 (D. Wyo. 1982).

The case of *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), clearly points out that there is no distinction between the regulatory and private functions of the government. The Court said:

> "It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures. Government is not partly public or partly private, depending on the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it." (Footnote omitted.) *Id.* at 383-84.

Three of these district court cases (*Tipperary Refining Co., Glenrock Refinery, Inc.*, and *Wyoming Refining Co.*) implied a waiver after distinguishing *McCulloch* because it was concerned with government regulatory activity.

Wesreco, supra, and *Young Refining Corp. v. Department of the Interior*, No. 82-2048 (E.D. La. July 6, 1983), found a waiver of sovereign immunity on the theory that the decision in *Mitchell, supra*, dictated the existence of a waiver in EPAA cases. *Mitchell* said:

> "For the reasons set forth below, we conclude that by giving the Court of Claims jurisdiction over specified types of claims against the United States,

> the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims." (Footnote omitted.) 463 U.S. at 212.

Clearly, *Mitchell* does not apply because the whole purpose of the Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1491(a)(1), is to permit suit against the United States, and it spells out that permission in specific terms. The EPAA merely speaks of "persons" who may sue or be sued.

The claim here does not fall within the Tucker Act because Section 211 places jurisdiction of EPAA claims in the district courts. On the other hand, the Tucker Act places jurisdiction of a claim for over $10,000 in the Court of Claims. The Court of Claims has held that in view of Section 211, it has no jurisdiction under the Tucker Act to review actions under Section 210. *The Poole & Kent Co.*, 214 Ct. Cl. 836 (1977).

Finally, there is no basis to the argument that Section 211 is a specific enactment which creates an exception to the jurisdictional amount limitation of over $10,000 in the Tucker Act. This argument was presented to this court in *McCulloch*, 577 F.2d at 715-16 and rejected at that time.

It is argued that since DOI has litigated and lost the sovereign immunity issue in the five district court cases,[2] it is collaterally estopped from raising the issue here. This contention is without merit. The Supreme Court has recently made it clear that the nonmutual offensive use of collateral estoppel sanction in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), is not applicable in suits against the United States. *United States v. Mendoza*, —— U.S. ——, 104 S.Ct. 568 (1984).

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[2] The government settled four of the five cases after losing the waiver issue in the district court. Only the last case (Wesreco) appears to be open.

The claim for damages based on transportation payments does not present an EPAA issue. It is a contract claim independent of any claim created by the EPAA and is not covered by the decision of this court that breach of contract claims going to violations of the EPAA are cognizable only as statutory claims. *Johnson Oil Co. v. Department of Energy*, 690 F.2d 191, 196 (Temp. Emer. Ct. App. 1982).

The complaint does not specify the amount sought to be recovered for such damage in this lawsuit. Recovery may be had in the district court if the amount is under $10,000. If not, the matter would have to be presented to the Court of Claims. This issue is remanded to the district court for resolution.

Plaintiff presents a claim of injury which on its face appears to call for a remedy. However, we are dealing with a statute which does not afford a remedy, and the plaintiff must look to the Congress for relief.

The judgment is affirmed except that the issue of damages for transportation payments is remanded to the district court for resolution.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Civil Action No. 83-3006

LUNDAY-THAGARD COMPANY

vs.

UNITED STATES DEPARTMENT
OF THE INTERIOR

[Filed Feb. 4, 1985]

RULING ON MOTION FOR RECONSIDERATION

This matter comes before the Court on Plaintiff Lunday-Thagard Company's ("Lunday-Thagard" or the "Company") Motion for Reconsideration of our December 6th Ruling that its crude-oil overcharge action, brought under the private action provision of the Emergency Petroleum Allocation Act, has prescribed by the passing of the Louisiana Civil Code's one-year prescription period, Article 3536. We rejected Lunday-Thagard's call for application of Article 3544 because the Temporary Emergency Court of Appeals ("TECA") has held (at least implicitly) that ten-year limitations are "inconsistent with national energy policy seeking to wind up regulation of the oil industry—'temporary' *ab initio*." *Johnson Oil Co. Inc. v. U.S. Dept. of Energy*, 690 F.2d 191, 196 (TECA 1982).

Now Lunday-Thagard would have us adopt the six-year limitation of 28 U.S.C. § 2401(a), for "civil ac-

tion[s] commenced against the United States" which do not sound in tort, even though it conceded before our Ruling that *Johnson, supra*, and *Ashland Oil Co. of Cal. v. Union Oil Co. of Cal.*, 567 F.2d 984 (TECA 1977), "clearly indicate the inapplicability of 28 U.S.C. § 2401 (a) . . ., since they state unequivocally that no federal limitation period applies." Plaintiff's Brief in Opposition to Motion to Dismiss, at 36, n. 28. Ironically, the Company now reveres *Ashland, supra*, for its supposed holding that we can apply the most analogous state limitation to an overcharge action "only in the absence of a statutory limitation provided by Congress." Memorandum in Support of Motion for Reconsideration, at 5. Then it cites our recent Ruling in *Geyen v. Marsh* for the proposition that section 2401(a) is "jurisdictional" and thus its application mandatory, *see* 587 F.Supp. 539 (W.D.La. 1984), and quotes *Glenrock Refinery, Inc. v. United States Department of the Interior*, holding that section 2401(a) is "definitive . . . even though a shorter state or federal provision would apply to identical proceedings involving individual parties." No. C84-0264-B, Slip op. at 6 (D.Wyo. Dec. 5, 1984). Finally, Lunday-Thagard argues that our reliance upon *Johnson* is misplaced, because the defendants there were private parties and thus without the reach of section 2401(a).

As to *Johnson*, TECA's affirmation of national energy policy transcends the facts of that case. And neither *Ashland* nor *Geyen* addresses the issue before us: whether the courts can apply a general federal limitation that is wholly inconsistent with national policy. *Ashland* merely reaffirms the basic precept of interstitial lawmaking, that "[g]enerally in the absence of a statutory limitation provided by Congress, a federal court will apply the most analogous state [rather than the most analogous federal] law of limitations." 567 F.2d at 989. And in *Geyen, supra*, we held only that plaintiff's exhausting administrative remedies cannot toll section 2401(a).

Finally, we disagree with the court in *Glenrock Refinery, supra*, that section 2401(a) is "definitive." We cannot apply it to overcharge actions, no matter how dispositive we might find it in other contexts, because it it just as anathematic to our national goal of deregulating the oil industry as the ten-year limitation rejected in *Johnson*.

Accordingly, we DENY Lunday-Thagard's Motion for Reconsideration.

THUS DONE AND SIGNED this 4th day of February, 1985, at Lake Charles, Louisiana.

/s/ Earl E. Veron
EARL E. VERON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Civil Action No. 83-3006

LUNDAY-THAGARD COMPANY

VS.

UNITED STATES DEPARTMENT
OF THE INTERIOR

[Filed Feb. 4, 1985]

JUDGMENT

For written reasons assigned this day;

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff Lunday-Thagard Company's Motion for Reconsideration be and it is hereby DENIED.

THUS DONE AND SIGNED this 4th day of February, 1984, at Lake Charles, Louisiana.

/s/ Earl E. Veron
EARL E. VERON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Civil Action No. 83-3006

LUNDAY-THAGARD COMPANY

v.

UNITED STATES DEPARTMENT OF THE INTERIOR

[Filed Dec. 6, 1984]

FOR THE PLAINTIFF	Messrs. Jerry E. Rothrock Akin, Gump, Strauss, Hauer & Feld 1333 New Hampshire Avenue, N.W., Suite 400 Washington, D.C. 20036 A. Lane Plauche Plauche, Smith & Nieset P.O. Box 1705 Lake Charles, LA 70602
FOR THE DEFENDANT	Richard K. Willard Acting Assistant Attorney General Joseph S. Cage, Jr. United States Attorney Lawrence Moon Assistant U.S. Attorney Stephen E. Hart Thomas Millet Attorneys, Civil Division Department of Justice 10th & Penn. Ave., N.W. Washington, D.C. 20530

EARL E. VERON
United States District Judge

RULING ON MOTION TO DISMISS

A. Introduction

In December 1983, Plaintiff Lunday-Thagard Company ("Lunday-Thagard" or the "Company") brought this action seeking recovery of, and treble damages for, the "overcharges" allegedly collected by the Department of the Interior ("DOI") in the sale of crude oil to Lunday-Thagard from June 1976 through January 1981, in violation of the Department of Energy's ("DOE") Mandatory Price Regulations in effect during that period. The Company's suit is based upon section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. § 754(a)(1), which incorporates the private action provision, section 210, of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. § 1904. The DOI would have us dismiss the suit for want of subject matter jurisdiction, arguing that Congress has not waived the United States' sovereign immunity for claims based upon section 210 of the ESA. Alternatively, the DOI seeks dismissal on the grounds that the suit has prescribed by the passing of one year under Article 3536 of the Louisiana Civil Code.

B. Facts

Between April 1973 and January 1981, the DOI entered into several contracts with Lunday-Thagard to supply it domestic crude oil, each incorporating the EPAA by reference. The EPAA empowered the President to allocate and price domestic crude in wake of the Arab Oil Embargo, *see* § 4(a) of the EPAA, and the DOE adopted a "two-tier" price ceiling to implement it: "old crude" carried a maximum price of $5.25 per barrel, but "new crude" could be sold for the then free-market price of

$14.00 per barrel. *See* 39 Fed. Reg. 1924 (Jan. 15, 1974); 41 Fed. Reg. 4931 (Feb. 3, 1976). The DOE also required producers to certify to customers in writing the amount of oil they purchased in each category, prohibited producers from collecting administrative fees or "surcharges" for certification, and instructed them to continue their long-standing practice of reimbursing refiners for transportation payments made to third parties. *See* 10 C.F.R. §§ 212.73, 212.74, and 212.131. All producers of domestic crude oil, including federal agencies, were subject to these Mandatory Pricing Regulations. *Mohawk Petroleum Corp. v. Department of Navy*, 521 F.2d 1394, 1395 (Temp. Emer. Ct. Apps. 1975). Lunday-Thagard complains that the DOI willfully failed to certify, either in timely fashion or in proper form, the oil it sold the Company after May 1976. This supposedly entitles the Company to treat all of that oil as "old crude," notwithstanding the Company's failure to allege that any portion was unqualified for the price category billed by the DOI. Lunday-Thagard calculates that it was "overcharged" nearly $6.08 million for that old crude, and $.11 million for administrative fees, "surcharges" and transportation charges. It now, as we note above, seeks to recover both its money and treble damages.

C. Analysis

We decide this motion upon the DOI's argument that Lunday-Thagard's suit has prescribed by the passing of one year. Neither the EPAA nor the ESA contains a statute of limitation, so the federal courts must apply the most analogous state limitation consistent with national energy policy to crude-oil overcharge actions. *Johnson Oil Co. Inc. v. U.S. Dept. of Energy*, 690 F.2d 191, 196 (Temp. Emer. Ct. Apps. 1982) ("TECA"). The DOI characterizes this action as one for EPAA pricing violations rather than breach of contract, thus seeking to make the one-year prescription of Louisiana Civil Code Article 3536, which applies to actions "resulting from offenses

and quasi offenses," the applicable state limitation. The DOI seeks support in *Johnson, supra*, where the counterclaimant sought to recover crude oil overcharges on contracts requiring it to pay "the highest legal price," to wit, the maximum price permitted under the EPAA. TECA held that the "dominant claim" was for "violation of the pricing regulations," because "the elements necessary to prove a violation of the pricing regulations for overcharging must be proved to establish a breach of the parties' contract for exceeding the 'highest legal price'." 690 F.2d at 196. TECA then applied Wyoming's two-year limitation for "a liability created by federal statute" instead of its ten-year contract limitation.

Lunday-Thagard characterizes this case as a pure contract action, thus seeking to make the ten-year prescription of Article 3544, which applies to "all personal actions, except those before enumerated," the applicable limitation. At the very least, the Company would have us follow the bifurcated approach of *Ashland Oil Co. of Cal. v. Union Oil Co. of Cal.*, 690 F.2d 984 (TECA 1982). In *Ashland*, TECA applied California's one-year limitation for "[a]n action upon a statute for a penalty or forfeiture" to plaintiff's claim seeking treble damages for intentional overcharges. But in its next breath, TECA applied the state's three-year limitation to plaintiff's claim for reimbursement of the overcharges. TECA reasoned that given "the complexity of the [DOE's] price regulations and the difficulty of determining compliance therewith," endorsing one-year limitations for actual damage claims would eviscerate the ESA's private action provision. 567 F.2d at 991.

Johnson's holding that in an overcharge action, the predominant claim is for EPAA pricing violations, prevents us from characterizing this action as a purely contractual one. The limitations available under Louisiana law, the one-year and ten-year prescriptions, also foreclose our use of *Ashland*'s bifurcated approach, because *Johnson* also held (at least implicitly) that ten-year limi-

tations are "inconsistent with national energy policy seeking to wind up regulation of the oil industry—'temporary' *ab initio*." 690 F.2d at 197. Had Lunday-Thagard alleged substantial difficulties in detecting DOI pricing violations, we might have preferred, however unpleasant the choice, to offend national energy policy by applying the ten-year prescription to the Company's reimbursement claim than to eviscerate section 210 of the ESA by endorsing the one-year prescription. But in the absence of such allegations, we are forced to apply Article 3536's one-year prescription to Lunday-Thagard's entire suit. Accordingly, we GRANT the DOI's Motion to Dismiss the Complaint.

THUS DONE AND SIGNED this 6th day of December, 1984, at Lake Charles, Louisiana.

/s/ Earl E. Vernon
EARL E. VERON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Civil Action No. 83-3006

LUNDAY-THAGARD COMPANY

v.

UNITED STATES DEPARTMENT
OF THE INTERIOR

[Filed Dec. 6, 1984]

JUDGMENT

For written reasons assigned this day;

IT IS ORDERED, ADJUDGED, AND DECREED that Defendant United States Department of the Interior's Motion to Dismiss Plaintiff Lunday-Thagard Company's Complaint be, and it is hereby, GRANTED.

THUS DONE AND SIGNED this 6th day of December, 1984, at Lake Charles, Louisiana.

/s/ Earl E. Veron
EARL E. VERON
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Civil No. 84-1967 LC

MESA PETROLEUM CO.,
Plaintiff,

v.

UNITED STATES DEPARTMENT
OF THE INTERIOR,
Defendant and Third Party Plaintiff,

v.

PHILLIPS PETROLEUM CO.; AMOCO PRODUCTION CO. (USA); CANADIAN OCCIDENTAL OF CALIFORNIA, INC.; OXY PETROLEUM, INC.; PETRO-LEWIS CORP., ROWAN PETROLEUM INC.; TERRA RESOURCES, INC., OUINTANA PETROLEUM CORP. (O&G and OFFSHORE); DECALTA INTERNATIONAL CORP.; FIN-OIL/AMERICANA PETROFINA CO. OF TEXAS; HNG FOSSIL FUELS CO.,
Third Party Defendants,

and

MESA PETROLEUM CO.,
Cross Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE DEFENDANT'S COUNTERCLAIM FOR INTERPLEADER AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
STATEMENT OF FACTS

STATEMENT OF FACTS

Plaintiff Mesa Petroleum Company is one of thirteen co-lessees of four gas leases covering submerged lands located on the outer continental shelf off Texas and Louisiana. The terms of the leases, as well as the Outer Continental Shelf Lands Act * and corresponding regulations,** require co-lessees to pay royalties to the Minerals Management Service (MMS) of the Department of the Interior on the value of production of gas on the leases. All production on the four leases is commingled and removed from a single platform.

On November 19, 1981, Mesa submitted to the Metairie, Louisiana, MMS office an application for a refund of alleged royalty overpayments of $1,508,748.32. The MMS may refund royalty overpayments provided that the lessee complies with certain requirements.*** A review was performed by the MMS (Metairie) and a number of problems were identified which precluded a speedy resolution of the refund request. On January 26, 1983, the MMS (Metairie) informed Mesa by letter of some of the problems that that were being uncovered by the preliminary review. Mesa's Ex. 17. An examination of Mesa's refund request indicated that some of the co-lessees included in Mesa's refund request had failed to report the correct volumes taken, or had calculated quantities based on their assigned working interest percentages, which resulted in an underpayment of royalties. *Id.* In addition, the quantities reported by Mesa in its refund request did not reconcile with the quantities reported on the production reports submitted by the operator of the

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* 43 U.S.C. § 1331 *et seq.*

** 30 C.F.R. Parts 206, 210, 212, 218, and 250.

*** 43 U.S.C. § 1339; Solicitor Opinion M-36942, 88 Interior Decisions 1090 (Dec. 15, 1981).

leases, Aminoil.* Because Aminoil did not respond to the MMS' requests for an explanation of this difference; MMS informed Mesa that an audit would have to be conducted before any refunds could be approved. The letter also advised Mesa that the portion of its refund request that represented payments made between October 1978 and October 1979 would be denied because of the two year statute of limitations contained in section 10 of the OCSLA.**

On June 14, 1983, the MMS completed its preliminary review of the status of lease royalties and recommended that a portion of Mesa's refund request be denied as being beyond the two year statute of limitations in section 10. Mesa's Ex. 20. The MMS also advised Mesa that it was preliminarily recommending a refund of $886,444, finding $481,441 of Mesa's claimed overpayment to be invalid. The MMS made no determination with regard to the validity of Mesa's claim that it had overpaid by $1,508,748. Mesa's Ex. H. These figures were calculated by comparing the total lease sales figures as shown on forms submitted to the MMS and the total volumes sold as obtained from the Aminoil allocation schedules, with the total payments made on each lease. The MMS requested that Mesa concur or comment regarding this revised refund amount.

On August 17, 1983, Mesa provided the MMS with summaries of overpayments and underpayments for each individual co-lessee; Mesa's summaries showed that there was an overpayment on each of the four leases. However, the amounts of the overpayments were incorrect as Mesa had apparently failed to subtract the amounts disallowed by the two year statute of limitations and had, through

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* Aminoil U.S.A., Inc., now known as Phillips Petroleum Co., is the lease operator on each of the four leases. 30 C.F.R. 250.31.

** The authority of the Secretary to approve valid refund requests is limited to those filed within two years of royalty payment. 42 U.S.C. § 1339(a).

the use of improper pricing and misallocations, understated the royalty amounts due.

It was at this point that it became evident to the MMS that a detailed audit of the four leases would be necessary. This was due in large part to discrepancies in Mesa's figures, particularly when compared with information obtained from an ongoing audit of Aminoil by the Office of the Inspector General (OIG). This OIG audit uncovered payment errors such as untimely filings under section 102 of the Natural Gas Policy Act of 1978 which caused incorrect pricing, misallocations of commingled volumes among pricing categories, and the reporting of incorrect sales volumes and values. Def. Ex. A at 2; Mesa's Ex. C. These payment accounting errors occurred with respect to all four leases and were not unique to Mesa's submissions.

Accordingly, on August 31, 1983, the MMS (Houston)* informed Mesa that a detailed audit of each of the four leases would have to be conducted. Mesa's Ex. 24. This audit period eventually was extended to September 1983 because some of the lessees continued to make late payments on amounts due during the initial audit period, thus affecting audit calculations.

In July 1984, all co-lessees were sent a schedule of payments, based upon the monthly Reports of Sales and Royalties received by the MMS, for verification. Mesa's Ex. J. None of the co-lessees responded to MMS' request. Def. Supp. Ex. 1 at ¶ 7**

On July 27, 1984, Mesa filed its complaint with this court seeking injunctive relief, declaratory judgment, and a writ of mandamus.

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* MMS (Houston) has supervisory authority over MMS (Metairie).

** Def. Supp. Ex. refers to the supplemental exhibits filed concurrently with this memorandum.

On December 14, 1984, the MMS formally denied Mesa's refund request. Neither admitting nor denying that Mesa had paid more than its share of the royalties, MMS denied the request because the co-lessees as a whole owed money on the leases. "A refund to Mesa would create an even greater deficiency in the lease accounts." Mesa's Ex. I. Three days later, on December 17, the MMS issued a Demand Letter and Bill for Collection to Aminoil and the other co-lessees for royalty underpayments of $827,743.54. Mesa's Ex. J. This amount was based upon the monthly Reports of Sales and Royalties which had been submitted to the MMS. The co-lessees were advised that they were jointly liable for the royalty underpayments.

On December 28, 1984, in response to the denial of its refund request, Mesa filed a notice of appeal with the Interior Board of Land Appeals (IBLA). Mesa's Ex. K. On January 14, 1985, Mesa filed a "protective" notice of appeal from the December 17 demand letter to Aminoil. Mesa's Ex. L.

On January 22, 1985, Robert Parker, Revenue Accounting Manager of Aminoil, notified the MMS that Aminoil had reviewed its payment records in light of the information provided by the MMS in July 1984, and concluded that the MMS had understated Aminoil's payments in the December 17, 1984 Demand Letter by about two million dollars. Once again, the information provided by the co-lessees to the MMS and the OIG during the audit was insufficient and required additional work.

As a result of an agreement with Aminoil to assist the MMS in determining the status of the lease accounts, on January 24, 1985, the MMS rescinded the December 17, 1984 Demand Letter and Bill for Collection and returned Mesa's "protective" notice of appeal. Mesa's Ex. N.

On February 26, 1985, the MMS filed a motion for summary remand with the IBLA, requesting that the

appeal be remanded. Mesa's Ex. O. Such a remand was necessary to permit the MMS to reconsider Mesa's refund request in light of the new information submitted by Aminoil. On March 12, 1985, this motion was granted. Mesa's Ex. Q.

On March 20, 1985, Aminoil provided royalty calculations for each co-lessee on the four leases along with a payment schedule for each lessee. The calculations and payment schedules. covered the audit period August 1978 through September 1983. With this information, eleven of the thirteen co-lessees met on April 11 to discuss the audit and a resolution of the problem of royalty payments. The parties eventually agreed to resolve any payment differences with the MMS within 30 to 60 days and to notify Aminoil of the final payment amounts. New information was submitted to the MMS which again altered the balances on the four leases. This information was processed and new balances furnished to the co-lessees, who agreed to accept the data as correct. Def. Ex. A at 2.

Meanwhile, on April 9, 1985, Mesa filed a motion for partial summary judgment. On May 6, 1985, the MMS filed a motion to dismiss for lack of subject matter jurisdiction and opposed Mesa's motion. On May 15, 1985, plaintiff filed its reply memorandum. Two days later on May 17, 1985, a status conference was held in Lake Charles. From that status conference, this Court entered a Minute Order dated May 17, 1985, in which the MMS was ordered to submit to Congress by July 19, 1985, "a statement of any amount of overpayment by the lessee." This overpaid amount was to be paid into the registry of this Court by September 3, 1985.

On July 18, 1985, MMS sent a letter to lease operator Phillips setting forth the results of MMS's review of Phillips' revised royalty calculations for August 1978 through September 1983 for the four leases. The report revealed net overpayments on leases OSC-G-2421 and

2743 of $317,105.15 and $1,055,189.16 respectively.* As to lease 2421, the report indicated eight co-lessees had overpaid $747,840.37, while the remaining five co-lessees had underpaid $430,735.22. On lease 2743, four co-lessees had overpaid by $1,179,956.30 and eight co-lessees had underpaid by $124,767.20. Finally, as explained in the letter, not all of the claimed net overpayments had been approved by the MMS due to: (1) failure to retroactively adjust royalties upon approval of section 102 prices, (2) failure to add gathering allowances, and/or (3) improper allocation of commingled volumes. After the recalculation of disallowances, the MMS determined, pursuant to section 10, that royalties were overpaid in the amount of $317,105.15 on lease OCS-G 2421 and $899,801.34 on lease OCS-G 2743.** Additionally, on underpaid leases OCS-G 2557 and 3286, $7,182.32 and $158,678.12, respectively, was still owed by the co-lessees. On August 28, 1985, a check for $1,216,906.49 was issued to the Clerk of this Court.

Meanwhile, MMS tried to encourage the co-lessees to settle the overpayment/underpayment dispute among themselves, which would have permitted Mesa to recover the full amount of its overpaid royalties. On July 10, 1985, the MMS sent to each of the co-lessees a letter informing them that MMS (Houston) had forwarded to Phillips Petroleum Co. (formerly, Aminoil), the lease operator, revised royalty payment schedules. However, the letter cautioned the co-lessees that MMS "is not legally obligated to police the accounting among the var-

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* Net overpayments occur when the difference between the overpayment and underpayment amounts is greater than zero.

** These amounts were calculated using a wet Btu measurement as directed by FERC Order 399 (49 *Fed. Reg.* 19293) and *Interstate Nat'l Gas Ass'n of Am.* v. *FERC*, 716 F.2d 1 (D.C. Cir. 1983). Some of the co-lessees, including Mesa, have already received refunds from the MMS based upon Order 399. The MMS will avoid double refunding of royalty amounts by billing the overpaid co-lessees.

ious co-lessees." The letter also requested that the co-lessees show cause by August 15, 1985, why the underpaying co-lessees should not be ordered to reimburse the overpaying co-lessees. The responses from the co-lessees were most discouraging. Mesa, ironically, was the most vehemently opposed to this good faith attempt to resolve the problem. Def. Supp. Ex. 3.

MMS now seeks dismissal of this case for lack of subject matter jurisdiction, or in the alternative, counterclaim for interpleader of the co-lessees. In any event, Mesa's motion for partial summary judgment should be denied.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER PLAINTIFF'S CLAIM.

Plaintiff herein seeks a partial summary judgment which, if granted, would result in a money judgment against the Department of Interior for $1,508,756.32. As discussed in our earlier memorandum *, while plaintiff prays for this relief under the guise of an order certifying Mesa's refund request, the indisputable result of the order will be to require federal defendant to pay an amount of money. As such, Mesa is seeking a money judgment for which jurisdiction lies exclusively in the United States Claims Court. 28 U.S.C. § 1491(a)(1).

In essence plaintiff now argues that the Outer Continental Shelf Land Act's (OCSLA) jurisdictional provision, section 23, 43 U.S.C. § 1349(b), withdraws Tucker Act jurisdiction from the Claims Court. Mesa's Reply Memo at 15. Since the status conference in this matter, a new decision has been rendered which further clarifies the answer to this issue.

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* Federal defendant presented some argument regarding this Court's lack of jurisdiction in its earlier memorandum dated May 6, 1985. Def. May Memo. at 16-19. Accordingly, those arguments will not be repeated herein.

As the Court is aware, a plaintiff, in order to have his claim litigated on the merits, must establish both subject matter jurisdiction in the court in question as well as a waiver of sovereign immunity. The Tucker Act, 28 U.S.C. § 1491 is "only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." *United States* v. *Testan*, 424 U.S. 392, 398 (1976). Thus, before a court may hear a Tucker Act claim, it must first determine whether some federal statute or regulation can fairly be interpreted as mandating compensation by the federal government for the damage sustained. *Testan*, *supra*, 424 U.S. at 400; *United States* v. *Hopkins*, 427 U.S. 123, 128 (1976).

In the instant matter, a waiver of sovereign immunity off non-monetary actions can be found in sections 10 and 23 of the OCSLA, 43 U.S.C. §§ 1339 and 1349. *Cf. United States* v. *City of Kansas City*, 761 F.2d 605, —— (10th Cir. 1985); *Hahn* v. *United States*, 757 F.2d 581, 586 (3d Cir. 1985). Were plaintiff's claim in a amount less than $10,000 this provision would also serve to confer jurisdiction upon the district court to adjudicate this matter.

However, it is well established that when a Claims Court remedy exists and nonetheless suit is brought in district court for declaratory relief and money damages, then the district court should defer jurisdiction to the Claims Court. *Mathis* v. *Laird*, 483 F.2d 943, 943-944 (9th Cir. 1973); *Warner* v. *Cox*, 487 F.2d 1301, 1304-1305 (5th Cir. 1974). As noted in our May Memo. at 16, plaintiff's suit is essentially one to recover a sum of money. Plaintiff's claim for declaratory relief seeks that the court declare that it is entitled to the refund of a certain specified royalty overpayment amount.* Further,

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* Plaintiff's claim for an injunction relates to the "take or pay" issue, which plaintiff apparently concedes in not properly before this court for failure to exhaust administrative remedies, and thus

despite its protests to the contrary, plaintiff's lawsuit is not one of true mandamus nature. Not only is Mesa seeking to compel payment of a sum of money, Mesa also asks that the court make a *determination* that a specific sum of money is due Mesa for an alleged breach of a contract. Such falls within the clear jurisdiction of the Claims Court. *See Doko Farms* v. *United States*, 588 F.Supp. 867, 869 (N.D. Tex. 1984); *see also New Mexico* v. *Regan*, 745 F.2d 1322, 1323 (10th Cir. 1984), and discussion thereof in Def. May Memo. at 17-18.

Where, as here, "a plaintiff's prime objective is to obtain money from the federal government, the intermediate steps to get that money do not govern the character of the action" or detract from the monetary character of the relief sought. *Heart of the Valley Metro. Sewerage Dist.* v. *EPA*, 532 F.Supp. 314, 317 (E.D. Wisc. 1981). Therefore, a monetary claim cannot be disguised as a suit for injunctive, mandatory, or other non-monetary relief to evade the exclusive jurisdiction of the Claims Court under 28 U.S.C. § 1491. *Hahn* v. *United States*, *supra*, 757 F.2d at 588; *New Mexico* v. *Regan*, *supra*, 745 F.2d at 1320-1321; *Amalgamated Sugar Co.* v. *Bergland*, 664 F.2d 818, 823-824 (10th Cir. 1981); *Alamo Navajo School Bd.* v. *Andrus*, 664 F.2d 229, 233 (10th Cir. 1981), *cert. denied*, 102 S.Ct. 2041 (1982). Mesa has attempted to use section 1349 of the OCSLA as an exception to the $10,000 limitation of the Tucker Act. However, an argument similar to Mesa's was rejected by the Fifth Circuit in the recent case of *Lunday-Thagard* v. *Dep't of the Interior*, No. 5-115 (T.E.C.A. July 26, 1985).

In *Lunday-Thagard*, the plaintiff argued that section 211 of the Emergency Petroleum Allocation Act (15 U.S.C. § 755, a similar statute to section 1349) authorized a claim for money damages against the Department

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is irrelevant to the motion for partial summary judgment. See Mesa's April Memo. at 4 n.1.

of the Interior. Citing *McCulloch Gas Processing Corp.* v. *Canadian Hidrogas, Ltd.*, 577 F.2d 712 (T.E.C.A. 1970), the Fifth Circuit found that section 211 did not constitute the necessary waiver of governmental immunity for money damages and accordingly the district court lacked jurisdiction over Lunday-Thagard's claim. *Id.* at 718. Because subsections 1349(a) and (b)(1) make no waiver of sovereign immunity as to money damages, Mesa cannot now use this section as a basis for jurisdiction in this court.

That Congress did not intend to give the district courts jurisdiction over money claims such as Mesa's is further shown by the language of section 1349(b)(2), which makes specific reference to money damages for personal injury claims.

Such an interpretation consistent with the 1978 amendments to the OCSLA, which altered the wording of 43 U.S.C. § 1349(b)(1), which stated that "[t]he United States district courts shall have original jurisdiction * * *", by *deleting* the word "original." Clearly it would appear Congress did not intend in enacting section 23 to divest the Claims Court of its long established jurisdiction.

For the foregoing reasons, federal defendant submits that neither of plaintiff's claims are properly before this court. First, plaintiff's claim regarding "take or pay" receipts should be dismissed for failure to exhaust administrative remedies. Secondly, this court lacks subject matter jurisdiction to award Mesa its claimed royalty overpayments.

II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT DEFENDANT'S MOTION TO FILE ITS COUNTERCLAIM FOR INTERPLEADER AND FEDERAL DEFENDANT SHOULD THEREAFTER BE DISMISSED FROM THE ACTION AS A DISINTERESTED SHAREHOLDER.

Rule 22 of the Federal Rules of Civil Procedure provides that a defendant may join to an action parties having claims such that the assertion of their claims may expose the defendant to to double or multiple liability. Thus, the purpose of interpleader is to compel potential claimants to resolve what essentially is a dispute among themselves, without "embroiling the stakeholder in the litigation over the merits of the respective claims" and thereby protecting against double or multiple liability and avoiding the vexation of multiple lawsuits.* *Lummis* v. *White*, 629 F.2d 397, 399-400 (5th Cir. 1980), *on remand*, 686 F.2d 225 (1981); *Cramer* v. *Phoenix Mut. Life Ins. Co.*, 91 F.2d 141, 146 (8th Cir. 1937), *cert. denied*, 302 U.S. 739; *Pacific Indem. Co.* v. *Marceaux*, 263 F.Supp. 892, 893 (W.D. La. 1966); *United States* v. *Am. Film Inst.*, 79 F.R.D. 374, 376-377 (D.D.C. 1978); Wright & Miller, 7 *Federal Prac. & Proc.* 362.

Here the MMS has deposited into the registry of the court the maximum amount of its refund obligation on the two overpaid leases, yet faces potential claims in excess of that amount from eleven different companies. Further, the potential for claims is not limited to just the overpaid leases (Nos. 2421 and 2743), but also ex-

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* 28 U.S.C. § 1335(a) also provides a remedy in interpleader. The major difference between Rule 22 and the statute as applied in this case is that under Rule 22, the stakeholder need not deposit the amount in dispute into the registry of the court nor admit liability to any of the claimants. We have chosen Rule 22 because it is not known whether Mesa concurs in our total overpayment amount of $1,216,906.49.

ists as to the underpaid leases (Nos. 2557 and 3286) because on each of the four leases certain co-lessees have overpaid. Clearly to grant federal defendant's motion for interpleader would service the purposes of interpleader by avoiding duplicative litigation and resolving all questions of liability in one proceeding. *Zelen* v. *Second New Haven Bank*, 454 F.Supp. 1359, 1365 (D.C. Conn. 1978). It is clear that in this matter the potential for "double or multiple diability" exists in that Mesa's co-lessees who have overpaid royalties also would have the right to a refund under section 10, 43 U.S.C. § 1339(a), should Mesa prevail with its novel accounting theory.

For example, on lease OCS-G2421, lessees Amoco, Canadian Occidential, Oxy Petroleum, Petro-Lewis, Rowan, Quintana O&G, and DeCalta have all overpaid their royalties by $178,811.78, $18,871.97, $2,318.39, $164,502.66, $2,913.12, $1,1,239.30 and $68,412.01, respectively. The MMS has determined that $317,105.15 is due to be refunded to the lessees on lease OCS-G 2421. However, only Mesa has filed suit to recover the overpaid amounts. Were the court to award Mesa all of the overpaid amount, the MMS would then be vulnerable to suit by each of the other overpaying leases for what would, in reality, have already been refunded to Mesa.* Further, even if Mesa were awarded only part of the total amount in the registry of the Court, the MMS would still be exposed to future lawsuits in which Mesa's co-lessees might dispute and successfully prove that they were entitled to amounts different from those provided by the MMS in this litigation.

Such certainly establishes a reasonable and bona fide likelihood of exposure to multiply liability and the vexation of conflicting claims on the overpaid amounts. *See Am. Fidelity Fire Ins. Co.* v. *Construcciones Werl, Inc.*, 407 F.Supp. 164, 173 (D.C.V.I. 1975). Such exposure is not mooted by Mesa's argument that it is entitled to an

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* Overpayments also exist on the other three leases.

individual refund. Mesa April Memo. at 18-20; Mesa Reply Memo. at 3-7. As the court noted in *Olivier* v. *Humble Oil & Refining Co.*, 225 F.Supp. 536, 538 (E.D. La. 1963), "it is immaterial under Rule 22 whether there is * * * independent liability." In *Olivier* the owner of certain land brought an action against Humble Oil for the unpaid accummulated royalties to which it was entitled pursuant to contract. Humble Oil counterclaimed in interpleader against Helis and Laudumiey, who also had royalty interests in the same land through a different chain of title. Humble Oil averred that it may be exposed to double liability, because of the potentially adverse royalty claims of Olivier and Helis and Laudumiey.

In opposing interpleader, plaintiff argued that because Humble Oil had directly conveyed to Olivier his overriding interest, Olivier's interest was independent of the others. This is analogous to Mesa's assertion that its right to a refund is independent of the other co-lessees because of something the MMS did to cause Mesa's overpayment to be separate from the lease account, such as accepting royalty payments directly from Mesa, or allowing Mesa to jointly hold a lease interest. Whatever Mesa is asserting, as the court said in *Olivier* in permitting interpleader:

> Under Rule 22 it is immaterial that a party counterclaiming for interpleader has so-called independent liability to plaintiff or that the claims of the parties sought to be interplead are independent of the claims of plaintiff. *Id.* at 539.

Thus, it is no defense to an action for interpleader that one of the parties claims independent liability. Accordingly, federal defendant submits its counterclaim in interpleader should be permitted.

III. IN ANY EVENT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED.

Plaintiff Mesa essentially contends that it is entitled to a refund in the full amount of $1,508,748.32. The errors in plaintiff's argument are two-fold. First, certain portions of the above-claimed figure are barred by the two year statute of limitations contained in section 10 of the OCSLA, 43 U.S.C. § 1339(a). See Def. May Memo. at 3. Secondly, plaintiff's argument is based on its unreasonable and self-centered notion that it is to be refunded its own overpayment without regard to the status of the royalty accounts of its co-lessees with whom it has deliberately chosen to conduct business. Defendant submits neither of these contentions is well founded.

In any event, to the extent plaintiff's motion seeks to compel the MMS to process Mesa' refund request, such has been accomplished and thus that portion of Mesa's motion is now moot.

A. Portions Of Mesa's Claimed Refund Amount Are Barred By The Statute Of Limitations.

There can be no question that a portion of Mesa's $1,508,748.32 refund request is barred by the statute of limitations contained in section 10 the OCSLA, 43 U.S.C. § 1339(a). Def. May Memo at 2-4.

The MMS's analysis of the July 1985 accounting submitted by Phillips, the lease operator, on behalf of the co-lessees, shows that on lease 2743, Mesa has overpaid its royalties in the amount of $912,881.54. Of that amount, however, MMS can refund only $820,575.21 because of the two-year statute of limitations. Def. Supp. Ex. 1, ¶ 4.*

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* Lease 4241 is also overpaid as a whole in the amount of $317,105.15, none of which at the present time is believed to be barred by the statute of limitations. On lease 2557, Mesa has underpaid its share by $42,635.91 accordingly to current account-

B. The MMS Properly Regarded The Lease Royalty Account As A Whole.

Mesa's view that MMS must treat it separately from its co-lessees defies federal law, the common law, and common sense. For the purpose of satisfying their obligations under the lease, the co-lessees stand as one. This unity of obligation was explained by the Department when it stated that "all parties holding undivided interests [in an OCS lease] are responsible for the rentals and royalties." *Continental Oil Co.*, 74 I.D. 229, 236 (1967).* Rather, Mesa would have MMS treat each co-lessee separately. In effect, Mesa claims that by granting a lease to more than one entity and accepting payments from each interest holder, MMS has created the equivalent of separate leases, each with its own distinct royalty obligation. The Department has rejected this view, holding that ownership of an undivided interest in a lease does not constitute ownership of a separate lease, but represents a partial interest in the lease as a whole. *Kirby Petroleum Co.*, 67 I.D. 404 (1960).

That MMS's view is correct is plain from the language of the lease. The MMS's view that the lease confers unified obligations is clearly illustrated by the obligation in the lease to drill for and produce gas. In order to extend the lease term beyond the initial five years, the lessees must drill for and produce oil or gas. Mesa's Exs.

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ings. On lease 3286, current figures indicate that Mesa has overpaid its share by $294,215.38, but that the lease as a whole is underpaid by $153,678.12.

* Mesa attempts to distinguish *Continental* on the grounds that the quoted passage referred only to undivided interests acquired through assignment. Mesa's Reply Memo at 9. That distinction, however, is insignificant. Regardless of how the lessee obtained its interest, whether through assignment or original lease issuance, the obligations conferred by the lease are identical. An assignment neither increases nor decreases the lease obligations. *See Mire* v. *Sunray DX Oil Co.*, 285 F.Supp. 885 (W.D. La. 1968).

1-4, § 4. Under the operating agreements for these four leases, Mesa is not required to participate in the drilling of any well. Def. Supp. Ex. 4-7 at Art. XIV. If the lease produces gas but Mesa elected not to participate in any more drilling beyond the fifth year of the lease, Mesa's proportionate share of the lease would not expire. The entire lease would remain in effect because of the gas production, regardless of who had participated in making the production possible. Just as production is viewed on a lease-wide basis, likewise royalties accrue for the lease as a whole.

It is reasonable and proper for the MMS to treat Mesa's pro-rata overpayments as being made on behalf of the other co-lessees when the lease balance is negative. First, nothing in the lease agreement exonerates Mesa from several liability. Indeed, the lease agreement describes the co-lessees as "Lessee" and obligates the "Lessee" to pay to the MMS "a royalty of 16⅔ percent in amount or value of production saved, removed, or sold from the leased area." Mesa's Exs. 1-4. No provision is made in the lease agreements to permit Mesa to be liable for royalties on something less than total production "from the leased area."

MMS's argument herein is consistent with the authority to seek cancellation of the lease when the co-lessees have not fully paid royalty. Section 5(d) of the OCSLA, 43 U.S.C. § 1334(d), provides for the judicial cancellation of a lease "whenever the owner of any producing lease fails to comply with any of the provisions of [the OCSLA], of the lease, or of the regulations issued under [the OCSLA]." The failure to pay proper royalties is the type of violation which warrants lease cancellation. *See Nunez* v. *Superior Oil Co.*, 572 F.2d 1119 (5th Cir. 1978); *Continental Oil Co.* v. *United States*, 184 F.2d 802 (9th Cir. 1950); H. Rep. 859, 97th Cong., 2d Sess. 18, reprinted at [1982] U.S. Code Cong. & Ad. News 4268, 4272 (If * * * failures to pay royalties are fla-

grant and persistent, the lease may be cancelled * * *.");
see also Melancon v. *Texas Co.*, 89 So. 2d 135 (La. 1956).
Furthermore, cancellation is not limited simply to the guilty lessee's interest, but includes the entire lease. Section 5(d) of the OCSLA, 43 U.S.C. § 1334(d), does not restrict cancellation to the particular interest held by the party which precipitated forfeiture proceedings. Instead, it states that the "*lease* may be forfeited and cancelled" whenever the owner violates a duty imposed by statute, regulation, or lease term. *Id.* (emphasis added). It says nothing about dividing the lease into cancellable and non-cancellable parts.

The MMS's view is also consistent with the nature of undivided interests under the common law. It is well established in equity that a co-tenant, such as Mesa, who discharges more than its share of a common debt has a right of contribution from the other co-tenants. The enforcement of this right often occurs through a subrogation decree. *Newbold* v. *Smart*, 67 Ala. 326 (1880); *Thurston* v. *Holden*, 265 F. 697 (Id. 1928); *Simpson* v. *Gardina*, 97 Ill. 237 (1881). The cases are legion which hold that a tenant in common who pays the entire amount of taxes or special assessments on property held in common has a right to contribution from his co-tenant. *Victoria Copper Mining Co.* v. *Rich*, 193 F. 314 (5th Cir. 1911); *Interstate Land Co.* v. *Doyle*, 52 So. 991 (S.Ct. La. 1910; *Anderson* v. *McGee*, 130 S.W. 1040 (Tex. Civ. App. 1910); *Roberts* v. *Roberts*, 278 S.W. 937 (Tex. Civ. App. 1925); *see also* 48 A.L.R. 586-603.

In *Van Brunt* v. *Gordon*, 54 N.W. 1118 (Minn. 1893), the plaintiff and defendant were lessees of land and agreed to pay to the lessor a certain rent and to pay the taxes on the land. The plaintiff paid all of the taxes and rent and brought suit for contribution from the defendant. The court stated:

> These taxes and rent constituted a debt which plaintiff and defendant were jointly obligated to pay, just

> the same as if they had brought the property and given their joint note for the purchase money. The simple facts are that both were equally bound by their contract to pay certain sums of money, and one of them has paid the whole. The familiar rule applies that the one who has paid more than his share is entitled to contribution from the other, to reimburse him for the excess so paid, and thus equalize their common burdens. This rule is based on the maxim that equality is equity.

Id. at ——; *see* also 106 A.L.R. 1212 (1937), 61 A.L.R. 587 (1927).

At no time has Mesa made any attempt to exercise its right of contribution against the underpaying co-lessees. Because Mesa has a contractual as well as an equitable right of contribution, it is not without a remedy against its delinquent co-lessees. *See generally*, Levmore *Explaining Restitution*, 71 Va. L. Rev. 65-124 (1985); *Dawson, The Self-Serving Intermeddler*, 87 Harv. L. Rev. 1409-1443 (1974); Palmer, 1 *Law of Restitution*, § 10.5. As has been noted:

> Unless othewise agreed, a person who has discharged more than his proportionate share of duty owed by himself and another as to which, between the two, neither had a prior duty of performance, is entitled to contribution from the other, except where the payor is barred by the wrongful nature of his conduct.

Restatement on Restitution § 81.

Finally, MMS's view is consistent with the way the co-lessees have agreed among themselves to operate the four leases. After receiving the leases, Mesa and its co-leases executed operating agreements for each of the four leases. These agreements govern the obligations of the co-lessees among themselves with respect to each lease and they show that the co-lessees expected to be treated as one

with respect to their obligations under the lease. Because Mesa's motion for summary judgment is most pertinent with respect to lease 3286,* we focus our argument on that agreement. Def. Supp. Ex. ——.

Under Article XI, the operator of the lease is to pay rental and minimum royalty to the lessor and then to charge the payment to the co-lessees "Joint Account." Through that account the co-lessees would reimburse the operator and themselves. Plainly, the co-lessees intend to discharge their rental obligation to the lessor as one. They do not pretend that each is responsible to the lessor solely for its percentage share of the rent or minimum royalty. Thus their percentage shares are relevant only among themselves. In most respects, the co-lessees have a similar arrangement for the payment of royalties. Further under Article XII, as a general rule, the "Operator shall pay or cause to be paid all royalties * * *." As an exception to this rule, if one of the non-operator co-lessees sells some of the production on its own, it "shall make payment of all royalties applicable to that portion of the production * * *." No agreement has been made to pay the lessor only their percentage shares of the royalty, except in this one 'separate sale' instance.

While Mesa has repeatedly disavowed having "control" over its co-lessees, it is clear that controls are present in the operating agreement. Under Article XXVI, no co-lessee may sell its interest in the joint lease without the approval of at least three of the parties holding 51% of the interest. Under Article IV, any assignment of an interest is subject to the provisions of the operating agreement. Under Article IV, any assignment of an

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* Leases 2421 and 2743 are overpaid as a whole as well as by Mesa from an individual point of view. On lease 2557, both the lease as a whole, as well as Mesa individually, are underpaid. Only with respect to lease 3286 is the court faced with the situation where, although the lease as a whole is underpaid, from an individual point of view Mesa has overpaid.

interest is subject to the provisions of the operating agreement. Under Article VI, a co-lessee who fails to pay its share of expense is placed "in default"; the others are liable for his unpaid share and obtain a lien against the defaulter's share of production. Under Article VII, the co-lessee may inspect the operator's accounting "at all reasonable times." Under Article X, the operator is required to furnish any co-lessee, upon request, a "monthly report on the production, and the volume and value of Oil and Gas Sales, from each producing well being operated on the Joint Lease."

In sum, in addition to other remedies at law or equity, the co-lessees have mechanisms in the operating agreement to learn of, and balance, overpayments and underpayments of royalty. They are well prepared to be treated as one when dealing with the lessor.

C. Mesa Is Not Entitled To Be Awarded The Entire Amount Overpaid On The Lease As If The Co-Lessees Did Not Exist.

Mesa has made three spurious arguments in an attempt to persuade this court to order the MMS to repay to Mesa the entire excess amount on the leases. First, Mesa argues that section 10 requires the MMS to treat Mesa individually. However, section 10 does not prevent the Secretary from refunding only when the net balance on a given lease is overpaid. Section 10 gives broad latitude to the Secretary to determine ("to his satisfaction") when an overpayment has occurred. Viewing the lease as a whole for refund purposes is a reasonable application of section 10.* To now require the MMS to police

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* It is likewise reasonable for the Secretary to treat overpaying lessees individually for purposes of applying the two year statute of limitations of Section 10. The event which begins the running of that limit is the date of payment, regardless of why or by whom it was made. 22 U.S.C. § 1339(a). If an individual co-lessee makes

the affairs among the several co-lessees and segment accounting for refunding, as Mesa suggests, is contrary to the reasonable interpretation of section 10 the MMS has made. There is a strong federal policy, confirmed by precedent, that administrative agencies have wide discretion over statutes entrusted to their case. "[T]he practical construction given to an act of Congress, fairly susceptible to different constructions, by those charged with the duty of executing it is entitled to great respect * * *." *McClaren* v. *Fletcher*, 256 U.S. 477, 481 (1921). It is the MMS's prerogative to interpret section 10 as conditioning refunds upon a net positive lease balance.

Next, Mesa contends that the government has changed its position of not holding all of the co-leassees "accountable for each others separate royalty payments." Mesa's Reply Memo at 4. Mesa claims such a change is in violation of section 101 of the Federal Oil and Gas Royalty Management Act (FOGRMA), 30 U.S.C. § 1711(c)(1), which states in pertinent part:

> The Secretary shall audit and reconcile, to the extent practicable, all current and past lease accounts for leases of oil or gas and take appropriate actions to make additional collections or refunds as warranted. The Secretary shall conduct audits and reconciliations of lease accounts in conformity with the business practices and record keeping systems which were required of the lessee by the Secretary for the period covered by the audit.

Mesa erroneously argues that section 101 puts the MMS "under a statutory duty to evaluate Mesa's royalty account and process Mesa's refund request on an *individual* basis, irrespective of the royalty account statue of other lessees." Mesa's Reply Memo at 4. However, sec-

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a payment on its own behalf the two-year period begins on that payment date and not some other date such as the date of a different co-lessee's payment.

tion 101 was enacted to require the MMS to use the same accounting practices during an audit as were used during the period of time covered by the audit. In the House Report on FOGRMA, the Committee on Interior and Insular Affairs noted that the intent of the bill was "for the Secretary to apply the same rules and regulations in the audit that were applicable at the time the royalty obligation was incurred." H.R. Report 97-859 on H.R. 5121, 97th Congress, 2d Session, [1982) U.S. Code & Ad. News 4268, 4288. This section was designed to prevent the Secretary from retroactively applying newly enacted regulations and in no way affects Mesa's obligations under the leases.

Moreover, even assuming that Mesa's interpretation of section 101 is correct, MMS has not altered its requirements for OCS royalty refunds. Contrary to Mesa's contentions, the MMS has not changed its accounting rules to now hold Mesa, or any other co-lessee, severably liable (i.e. individually liable for 100% of the royalties due).* Mesa has confused several liability with conditioning refunds upon the existence of a positive net balance. Mesa's claim that the MMS "acknowledged in two uncompleted rulemaking proceedings that it has never before held an individual payor in Mesa's situation responsible for other lessee's royalty underpayments." Mesa's Reply Memo at 5. The "single payor" proposal to which Mesa refers, however, is fundamentally different than the Mesa situation. The single payor idea would establish one entity who would be "responsible for maintaining all lease production and sales records, and for the payment of rentals and royalties." 49 *Fed. Reg.* 47624-25 (Dec. 6, 1984). The single payor's responsi-

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* The expression "severally liable" when applied to multiple parties implies that each is liable alone. *Pruyn* v. *Black*, 21 N.Y. 300, 303. Black's Law Dictionary (5th Ed.) defines "severally liability" as "[L]iability separate and distinct from liability to another to the extent that an independent action may be brought without joinder of others."

bilities essentially would include every lease obligation; in effect, it would place an intermediary between the MMS and each co-lessee. The rulemaking proceedings to which Mesa refers were solicitations by the MMS for comments on a proposal to establish for each federal lease a "single payor." * Mesa's situation is much more limited. The MMS is not insisting that Mesa act as single payor and pay the entire royalty due on the leases. Instead, MMS, which has sent demand letters to the underpaying lessees, merely has conditioned Mesa's refund on a positive lease account balance. This prerequisite falls far short of establishing a single payor concept and several liability.

Finally, Mesa argues that only the MMS is in the position to acquire the information necessary to calculate the amounts owing on the lease accounts and therefore the co-lessees cannot be responsible for each other accounts. This is simply not true. Mesa has contracted with the other co-lessees for the right to examine all accounting information.** Article VII of the Operating Agreement between Mesa and its co-lessees states in part:

> Operator shall keep an accurate record of all accounts hereunder showing the costs expenditures incurred and charges made and all credits received and returns made and received of non-operators [co-lessees] or its duly authorized representatives.

Thus, Mesa should not be permitted to have the MMS enforce its Operating Agreement rights. Operating

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* This proposal never reached the proposed rule stage.

** Mesa claims that examining the accounting information for the lease, including information supplied by its co-lessees pursuant to the Operating Agreement, would expose it to accusations of antitrust violations. Mesa's Reply Memo at 11. The exchange of price and sales information is not a *per se* violation of the antitrust laws; in fact, when the exchange occurs in furtherance of the public interest (*i.e.*, the timely and complete payment of royalties), it would be no violation at all. *See Parker* v. *Brown*, 317 U.S. 341 (1943).

Agreements are just between the co-lessees and their lease operator. The Operating Agreement in no way changes the rights or obligations of a co-lessees or the MMS. *Peterson*, 58 I.D. 661 (1944), *aff'd*, *Peterson* v. *Ickes*, 151 F.2d 301 (D.C. Cir. 1945).

CONCLUSION

For the foregoing reasons, it is respectfully requested that defendant's motion to dismiss be granted, or in the alternative that defendant's motion for interpleader be granted; and that in any regard, that plaintiff's motion for partial summary judgment be denied.

Dated: September 9th, 1985.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing MOTION TO FILE COUNTERCLAIM IN INTERPLEADER, COUNTERCLAIM FOR INTERPLEADER, MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE DEFENDANT'S COUNTERCLAIM FOR INTERPLEADER AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT and order thereon, were served upon counsel by placing the same in the United States mail, postage prepaid, properly addressed, this 9th day of September, 1985:

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